

Katherine Jane Morris
Administrative Hearing Officer
City of San Diego

IN THE MATTER OF)	
)	
WALGREENS)	APPEAL---DENIAL OF TYPE 20 OFF-SALE
3005 MIDWAY DRIVE)	BEER & WINE LICENSE BASED ON PUBLIC
SAN DIEGO, CALIFORNIA)	CONVENIENCE OR NECESSITY
REPRESENTED BY DALE)	ADMINISTRATIVE ENFORCEMENT ORDER
MALEE, DISTRICT MGR.)	
_____)	

I
STATEMENT OF THE CASE

This matter came on regularly for hearing before Katherine Jane Morris, Administrative Hearing Officer for the City of San Diego on 30 November 2010 at 1:30 p.m. and was heard on that date, notice duly and regularly given. The purpose of the hearing was to determine whether the decision of the San Diego Police Department to deny a Type 20 Off-Sale Beer & Wine License based on the provisions of Public Convenience or Necessity as stated in the San Diego Business and Professions Code section 23958.4 shall be upheld.

Sgt. Linda Griffin, Vice Administration Unit, represented the San Diego Police Department. The manager of Walgreens at 3005 Midway Drive, Fred Radtke, and the District Manager for Walgreens in San Diego and Orange Counties, Dale Malee, were present and were represented by Jennifer LaFond Chavez, Esq.

The following individuals testified on behalf of the San Diego Police Department:

1. Sgt. Linda Griffin, Vice Unit.
2. Joe Dalton, Crime Analyst.

The following individuals testified on behalf of the appellant, Walgreens:

1. Fred Radtke, Store Manager at 3005 Midway Drive.
2. Dale Malee, District Manager, San Diego and Orange Counties.
3. Jennifer LaFond Chavez, Esq., Luce, Forward, Hamilton & Scripps, LLP.

The following documents or other physical evidence were introduced by Sgt. Griffin and received into evidence:

1. Exhibit #C1: PCN Hearing Brief, 11/30/10, Walgreens, 3005 Midway Drive.
2. Exhibit #C2: San Diego Business and Professions Code section 23958.4.
3. Exhibit #C3: Guidelines for Determining Public Convenience or Necessity.

4. Exhibit #C4: Letter dated 10/18/10 from Sgt. Linda Griffin to Jennifer Chavez, Esq. denying a Type 20 License for the Walgreens located at 3005 Midway Drive.
5. Exhibit #C5: Notice of Hearing dated 11/19/10 from Debra Fischle-Faulk, Administration Director to Jennifer Chavez, Esq.
6. Exhibit #C6: Form Per Section 23958.4 B&P, City of San Diego, For Off-Sale, On-Sale Beer, and Public Premises Licenses showing application date of 7/20/10 and denial date of 10/18/10.
7. Exhibit #C7: Memorandum from Joe Dalton, Crime Analyst, dated 7/30/10 addressed to Sgt. Linda Griffin, Vice Unit, re: Walgreens, 3005 Midway Drive with Search Criteria 1/1/09-12/31/09 with attachments including SDPD Alcohol Arrests & Cites by Federal Census Tract #006802; SDPD Alcohol Arrests & Cites by Federal Census Tracts January to December 2009; Alcohol and Beverage Control Licenses (San Diego) 3005 Midway Drive – 0.2 Mile Radius (4 pgs.); California Department of Alcoholic Beverage Control, County of San Diego (Retail Licenses) and Census Tract = 68.02 (3 pgs.); Request for Information Form for tract 068.02; Photographic Exhibit (7 photos); California Department of Alcoholic Beverage Control License Query System Summaries (6); Calls for Service, 3005 Midway, from 1/1/09-12/31/09; CAD Incident Reports, Walgreen Drug Store, 3005 Midway Drive in 2009 (8); ABC License Request Work Up Sheet.
8. Exhibit #C8: Email dated 7/29/10 from Lt. Jerry Hara, SDPD Western Division to Sgt. Linda Griffin.
9. Exhibit #C9: Letter dated 2/25/10 to Jennifer Hill, District Administrator, Alcoholic Beverage Control from Sgt. Andra Brown, SDPD Vice Section.
10. Exhibit #C10: Letter dated 2/4/10 from Maritza Gonzalez, Licensing Representative II, Department of Alcoholic Beverage Control to Sgt. Brown, SDPD with attachment.
11. Exhibit #C11: /Email dated 1/28/10 from Sgt. Andra Brown requesting response to new ABC license application for Walgreens, 3005 Midway Drive, Feb. 2010 with attachments (same at #7); Email dated 2/2/10 from Lt. Kimberly McElroy, SDPD Western Division to Sgt. Andra Brown.
12. Exhibit #C12: Letter dated 10/28/10 from Jennifer Chavez, Esq. appealing the decision of the SDPD to deny a finding of Public Convenience or Necessity for the Walgreens at 3005 Midway Drive.

II FINDINGS OF FACT

1. In January 2010, several San Diego area Walgreens Stores having applied to the ABC for Type 20 Off-Sale Beer and Wine permits, including the Walgreens located at 3005 Midway Drive, San Diego, California a case was opened and assigned to Sgt. Andra Brown, San Diego Police Department, Vice Department-Investigations.

2. Sgt. Brown was sent a letter dated from the ABC dated 2/4/10 requesting input from the SDPD to the application to sell alcoholic beverages at the Walgreens located at 3005 Midway Drive; upon the completion of her investigation, Sgt. Brown sent a letter dated 2/25/10 to Jennifer Hill, District Administrator, ABC in which she stated that the San Diego Police Department wished to protest the application for a Type 20-486129 for the Walgreens located at 3005 Midway Drive on the grounds that it would add to high crime, there was an over-concentration of licenses in that vicinity, and new ABC licenses tended to aggravate existing police problems.
3. An application dated 7/20/10 was subsequently submitted to the City of San Diego for a license type 20 Off-Sale Beer and Wine by Jennifer Chavez, Esq. on behalf of the Walgreens located at 3005 Midway Drive, San Diego, California 92110.
4. The application was referred to Sgt. Linda Griffin, SDPD, Vice Administration Unit who conducted an investigation including visits to the premises and surrounding location. Based on the information gathered from her visits, the response of the Western Division of the SDPD, and the statistics from the SDPD crime analyst, Sgt. Griffin denied the application in a letter to Ms. Chavez dated 10/18/10. In the letter she stated: "The premises falls within a crime data area which has a twenty percent greater number of reported crimes than the average number of crimes for all crime data areas in the City (High Crime area); an undue concentration of ABC licenses exist within the census tract; The business will not serve business or residents not currently being served by the same or similar business; This license will aggravate existing Police problems.
5. At the hearing of 11/30/10, Sgt. Griffin referred to the Guidelines for Determining Public Convenience or Necessity and highlighted those which were not in conformity with the applicant, specifically #1: the application will impact the number of ABC licenses in the area and will contribute to the over concentration of ABC licenses already existing; # 2. The business will not serve businesses or residences not currently being served by a same or similar business; Sgt. Griffin pointed out the large number of similar businesses already licensed to sell alcohol both within census tract 6802 and the two tracts immediately surrounding it; #3 Dewey Elementary School is within 600 feet of the Walgreens; #4 The census tract is over-concentrated with ABC licenses (3 allowed/6 active/1 pending). It is considered high crime due to a crime rate of 129.9% (over 120% is considered high crime). Alcohol-related arrests and citations in 2009 totaled 91 which is 146.7% of the acceptable crime rate; #5 While in 2009 there was only 1 reported crime against the business (which is below the acceptable rate of 4), there were 68 calls for service with a majority of these being disturbances (415s) with at least 8 of those calls specifically referring to a person drunk in public or a loitering transient; #6 the sale or service of alcohol to law-abiding residents/visitors

does promote goals of the City. However, the addition of another alcohol outlet would merely add to the already existing over-concentration of licenses in this area; #10 As the SDPD Vice Unit has the authority to determine Public Convenience or Necessity in alcoholic beverage licensing matters, Sgt. Griffin sought the input of the SDPD Western Division which services the area in question. The response was negative due to the over-concentration of ABC licenses in the area and the high crime rate, in particular the alcohol-related crime that already exists in census tract 6802.

6. Sgt. Griffin concluded that of the ten Guidelines for Determining Public Convenience or Necessity set by City Council Resolution R-294124, five and a half were in conflict with the application for a Type 20 License for the Walgreens at 3005 Midway Drive, and she asked that the SDPD's decision to deny the application be upheld.
7. At the hearing of 11/30/10 the appellants, represented by Ms. Chavez, took the position that Walgreens', which is the largest drug store chain in the country, could point to decades of experience as a responsible seller of regulated products including alcohol, tobacco and pharmaceuticals. They stressed that the Walgreens at 3005 Midway Drive would set aside less than ten percent of floor space in its existing store for the sale of beer and wine to casual drinkers. In doing so they would provide "one-stop shopping" to their customers. Further, Walgreens would not sell single bottles or cans of beer or malt liquor, and all cashiers and managers would be required to undergo training based on corporate policies and procedures which Walgreens had developed over time. The appellants further took the position that census tract based statistics were an imprecise way to determine whether a new off-sale license should be issued, and were based on data that was developed from the 2000 Census which is almost ten years old. Many of the crimes reported by the police occurred in the area of Walgreens, not at the store itself. The store manager testified regarding the pro-active measures which he had taken to discourage transients and alcohol use at or near the premises, including a no trespass order from the court which was suggested by the SDPD. The district manager felt that lack of a Type 20 License would put the Walgreens at a competitive disadvantage with stores both in its census tract and in nearby census tracts. In conclusion they asked that the Walgreens located at 3005 Midway Drive be granted a Type 20 License based on Public Convenience or Necessity.
8. A written notice of the time and place of this hearing was served upon the appellant at least ten (10) calendar days prior to the hearing.
9. The written notice was served upon the appellant in accordance with San Diego Municipal Code section 11.0301 by certified mail, postage prepaid, return receipt requested. Simultaneously, the same notice was sent by regular mail.

III DETERMINATION OF ISSUES

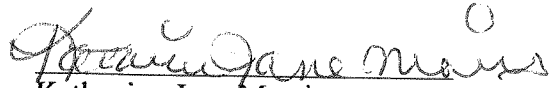
1. By reason of the facts found in Findings of Fact paragraph numbers 1 and 3, Walgreens is the Responsible Party.
2. By reason of the facts found in Findings of Fact paragraph numbers 8 and 9, the appellants were notified of this Administrative Hearing.
3. By reason of the facts found in Findings of Fact paragraph numbers 1 and 3, Walgreens applied for a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3005 Midway Drive, San Diego, California.
4. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6, the appellants failed to meet the criteria for Public Convenience or Necessity as defined in the San Diego Business and Professions Code section 23958.4.
5. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6, the SDPD properly reviewed the application for a Type 20 Off-Sale Beer and Wine License for the Walgreens located at 3005 Midway Drive, San Diego, California and compared it to the standards set forth in Business and Professions Code section 23958.4.
6. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6, the San Diego Police Department's denial of a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3005 Midway Drive, San Diego, California shall be upheld.

**IV
ORDER**

THEREFORE, the following order is made:

The decision to deny a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3005 Midway Drive, San Diego, California is upheld.

Dated: 12/24/10


Katherine Jane Morris
Administrative Hearing Officer

JENNIFER LA FOND CHAVEZ, ASSOCIATE
DIRECT DIAL AND FAX NUMBER 619.699.2537
EMAIL ADDRESS jchavez@luce.com

October 28, 2010

38415-6656

VIA E-MAIL AND U.S. MAIL

Administrative Hearings
Citizens Review Board on Police Practices
202 C Street, MS 9A
San Diego, CA 92101
Attn: Ms. Denise Sandoval

**Re: Ref No. 1914141113/Appeal of Police Department Decision to Deny Finding of
Public Convenience or Necessity for Walgreens at 3222 University Avenue**

Dear Ms. Sandoval:

Pursuant to San Diego Municipal Code section 33.0501, this letter serves as Walgreens' appeal of the San Diego Police Department determination, dated October 18, 2010 and received by us on October 20, 2010, that a finding of public convenience or necessity ("PCN") cannot be made for the issuance of an ABC Type 20 License for the existing Walgreens store at 3222 University Avenue in San Diego (a copy of which is enclosed for your reference). Walgreens, the nation's largest drug store chain, has decades of experience as a responsible seller of regulated products such as pharmaceuticals, tobacco and alcohol. As the following explains, that experience will be brought to bear if the City approves Walgreens' proposal to dedicate a small percentage of its existing store in North Park to the sale of beer and wine for the casual drinker. For those and the other reasons described below, Walgreens respectfully requests that a hearing officer find that issuance of a Type 20 license to Walgreens would serve the public convenience or necessity.

Public Convenience or Necessity Would be Served By Issuance of A Type 20 License to Walgreens

State law establishes PCN thresholds, after which, the consent of the relevant local agency is required before the ABC may issue additional off sale licenses within a census tract. That law regarding PCNs does not require a denial of an alcohol license when the threshold is triggered, only an analysis of whether the specific application before the local agency is convenient or necessary. A PCN is required here because of the crime rate and the number of existing off-sale alcohol establishments within the applicable census tract. Walgreens is located in Census Tract 16. Based on 2000 population counts, the threshold for requiring a PCN in this census tract is 4 off-sale licenses and 4 licenses currently exist.

The public convenience or necessity would be served by permitting beer and wine sales for off-site consumption at the 3222 University Avenue Walgreens store. Walgreens is a national chain of retail drugstores selling prescription and over-the-counter medicines as well as a variety of general

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merchandise, sundries and grocery items to the public. Walgreens will dedicate only a very small percentage of the 13,650 square foot store for beer and wine sales. As such, beer and wine sales are expected to account for only a small percentage of overall sales. Further, unlike some other nearby retailers, Walgreens is not requesting a license to sell liquor nor will it sell single bottles or cans of beer and malt liquor as its inventory will only target the casual consumer of beer and wine.

Of equal importance to this appeal, the impetus for the sale of beer and wine is demand from existing Walgreens customers. By adding beer and wine to the other retail items already offered in the store, Walgreens can better serve the surrounding community by providing its customers with the convenience of “one-stop” shopping. Walgreens will also offer the security and crime prevention measures, described in more detail below, not available at other stores in the area. As demonstrated by the attached ABC chart, Walgreens will be the only store with a limited beer and wine inventory that is offering all the above described security and convenience within Census Tract 16.

Beer And Wine Sales Will Not Aggravate Existing Police Problems or Otherwise Adversely Impact Police Resources

As noted above, a PCN is required because Walgreens is located within a census tract with a crime rate that is at least 20% greater than the Citywide average crime rate. Walgreens is an experienced and trusted retailer that has sold regulated products, including pharmaceutical and tobacco, in all types of neighborhoods (including others like North Park) and Walgreens will bring that experience to its proposed alcohol sales program. Along those lines, so as to ensure compatibility with surrounding neighborhoods, Walgreens has taken measures to assure that any alcoholic beverage will be sold in a highly responsible and conscientious manner. Detailed, corporate policies and procedures are already in place and will be strictly enforced. The policies and procedures may include requirements such as:

- Employees at each store must undergo training prior to beer and wine being made available for sale at the store;
- Each cash register clerk must submit a policy acknowledgement as part of the daily log-in and log-out process;
- Each cash register clerk must request identification and proof of age for any customer attempting to purchase beer or wine who appears to be under the age of 40. Pre-programmed cash register “prompts” will remind the clerks to request this proof;
- Any under-aged employees will be required to involve the manager or assistant manager for the sale of beer or wine.

Training will be accomplished in part through a Walgreens internal alcohol sales training program, which is required for all cashiers and managers. The training program focuses on recognizing and

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preventing sales of alcohol that may be detrimental to the public welfare (i.e., the sale of alcohol to minors and intoxicated persons). Implementation of this program will help ensure that the sale of alcohol at the store will not be detrimental to residents, shoppers, or other business in the vicinity of this store.

Walgreens also uses a variety of security strategies to ensure the safety of their employees and customers as well as the security of its merchandise. For example, cameras and public view monitors have been installed in all Walgreens stores to deter criminal activity and promote security. The digital images captured from these devices are stored for a period of time on a Digital Video Recorder and can be made available to the Police Department. Beer and wine displays will also be positioned on the opposite side of the store from where the entrance is located. To prevent abuses, Walgreens will also only sell beer in 6 packs, 12 packs, 18 packs and cases. Walgreens will not sell beer by the individual can or bottle. With all of these measures in place, the issuance of a beer and wine license to Walgreens will not have a material and adverse impact on police resources or the community in general.

Census Tract Based Statistics Are In Imprecise Way to Determine Whether a New Off-Sale License Should Be Issued

PCN Thresholds are Based on Outdated 2000 Census Data: A finding of public convenience or necessity ("PCN") is required for Walgreens because, based on 2000 census data, the census tract has more than one Type 20 or 21 license for every 1,250 inhabitants within it. There were 6,126 inhabitants living within Census Tract 16 in 2000, which means the PCN threshold for off-sale licenses is 4.9. Four licenses already exist. However, the City of San Diego's population increased from 1,223,400 in 2000 to 1,306,300 in 2009.¹ This population increase of 82,900 increases the threshold for PCN determinations by an additional 66 licenses within the City as a whole. If just 124 of those new inhabitants reside within census tract 16, then a fifth license could be issued to Walgreens without triggering the alcohol license threshold for a PCN.

PCN thresholds fail to consider local land use patterns: The census tract and household population based PCN threshold assumes that alcohol retailers and household populations will be spread evenly throughout a City. That analytical approach fails to consider an individual City's land use and zoning patterns. Census Tract 16, for example, is bisected by Interstate 805 and includes busy commercial corridors along University Avenue and El Cajon Avenue. As a result of these and other non-residential land uses within the census tract, the threshold for requiring a PCN is lower than it would be in a predominantly residential census tract of a similar size. Indeed, some census tracts surrounding Walgreens do not trigger the PCN threshold because they are predominantly residential and/or non-commercial. In fact, if one conducts the PCN analysis with respect to all the census

¹ U.S. Census Bureau

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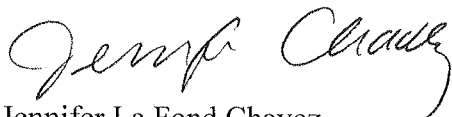
tracts that share a border with Census Tract 16,² the threshold for triggering a PCN would be 25 licenses and only 23 exist (not including surrendered licenses).

Walgreens will serve the residential population within all the above mentioned census tracts, as well as others living and working in the surrounding area and traveling along the nearby I-805. Further, the issuance of the ABC license to Walgreens is necessary in order for the community to benefit from competition between Walgreens and the CVS located across the street from Walgreens in Census Tract 15. Currently, Walgreens is at a competitive disadvantage because CVS already sells alcohol pursuant to an existing ABC license. If CVS has to compete on a level playing field with Walgreens, each of these national retailers will be encouraged to provide the type of safe and customer oriented environment that the surrounding community expects and deserves. If the PCN finding for Walgreens is withheld, the benefits of true competition are lost and it is the surrounding community that suffers in the end. Therefore, the City should find that issuance of an ABC license to Walgreens is appropriate and would serve the public convenience or necessity.

Conclusion

The foregoing demonstrates that public convenience and necessity would be served and even enhanced by the sale of beer and wine at this Walgreens store. Such sales would facilitate convenient, "one-stop" shopping for Walgreens' many customers in the City of San Diego. Sales at Walgreens will be conducted in a way that maximizes public safety, minimizes public nuisance and at a location that is very well suited for beer and wine sales. Additionally, the beer and wine sales will allow Walgreens to remain competitive with retailers in the vicinity such as CVS. This competition will not only benefit the community in general, it will help to maintain the up to 37 full time and part time jobs generated by Walgreens. For all of these reasons, the City should make a finding of public convenience or necessity for the proposed sale of beer and wine at Walgreens' 3222 University Avenue store.

Sincerely,



Jennifer La Fond Chavez

for

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

JLC/

Enclosures

cc: Brian Fish, Esq.
Michael Redstone, Esq.

² Census Tract 12, 13, 15, 17, 22 and 24.



THE CITY OF SAN DIEGO

October 18, 2010

LFH&S/JSL

OCT 20 2010

RECEIVED

IN REPLYING PLEASE
GIVE OUR REF.NO.
1914141113

Certified Mail #7008 0150 0002 4313 3171

Ms. Jennifer Chavez
600 W. Broadway, Ste. 2600
San Diego, CA 92101
Reference: PCN Application @ 3222 University Avenue, San Diego

THIS LETTER IS TIME SENSITIVE

Dear Ms. Chavez:

On July 20, 2010, you requested a Public Convenience or Necessity evaluation of the premises located at 3222 University Avenue, San Diego, California. Your request was to acquire a Type 20 (Off-Sale Beer and Wine) License for an existing Walgreens at that location. In accordance with the standard operations of Walgreens stores nationwide, the store offers a wide range of goods and food items and is seeking to include beer and wine in its inventory.

In accordance with Business and Professions Code, section 23958.4, your application is required to meet standards for public convenience and necessity. Your application, for the described premises, fails to meet those standards for one or more of the following reasons:

- X The premises falls within a crime data area which has a twenty percent greater number of reported crimes than the average number of crimes for all crime data areas in the City (High Crime area).
- X The issuance of a new license will result in an undue concentration of ABC licenses within the census tract.
- X The business will not serve businesses or residents not currently being served by a same or similar business.
- X This license will aggravate existing Police problems.

CITY OF SAN DIEGO POLICE DEPARTMENT
VICE OPERATIONS
1401 BROADWAY, SAN DIEGO, CA 92101-5729
PHONE: (619) 531-2452 FAX: (619) 531-2449



**California Department of Alcoholic Beverage
Control
For the County of SAN DIEGO - (Off-Sale Licenses)**

and Census Tract = 16

Report as of 10/28/2010

	License Number	Status	License Type	Orig. Iss. Date	Expir Date	Primary Owner and Premises Addr.	Business Name	Mailing Address	Geo Code
1)	168447	ACTIVE	21	2/22/1985	7/31/2011	KASHAT, HARTH G 3392 UNIVERSITY AVE SAN DIEGO, CA 92104 Census Tract: 0016.00			3710
2)	308005	ACTIVE	20	8/9/1995	7/31/2011	SHAO, ADEL YALDA 3347 EL CAJON BLVD SAN DIEGO, CA 92104 Census Tract: 0016.00	COST MART		3710
3)	424853	ACTIVE	20	5/26/2005	4/30/2011	PANCHO VILLAS INC 3245 EL CAJON BLVD SAN DIEGO, CA 92104 Census Tract: 0016.00	BONEYS PANCHO VILLAS FARMERS MARKET		3710
4)	472728	ACTIVE	21	12/5/2008	11/30/2010	APRO LLC 3252 UNIVERSITY AVE SAN DIEGO, CA 92104-2036 Census Tract: 0016.00	APRO 41	17311 S MAIN ST GARDENA, CA 90248- 3131	3710

--- End of Report ---

For a definition of codes, view our [glossary](#).